*United States Court of Appeals*

*for the Second Circuit*

# BRIEF FOR APPELLEE

Signed

76-1596

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANDREW GARGUILO,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT E. LINDSAY,
RICHARD B. BUHRMAN,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.



Of Counsel:

DAVID G. TRAGER,
United States Attorney.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the jury was properly instructed on the element of willfulness.

3. Whether the court below erred in admitting and excluding evidence.

4. Whether there was a fatal variance between the indictment and the proof.

5. Whether the court below erred in denying the motion for a severance.

6. Whether the judgment should be reversed for alleged inconsistencies in the verdicts.

## STATEMENT OF THE CASE

In October, 1975, an eight-count indictment was filed in the United States District Court for the Eastern District of New York, charging defendant, Andrew Garguilo, and his brother, Anthony Garguilo, with crimes against the revenue. Count I charged that the brothers, continuously from 1969 to 1975, did conspire to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in ascertaining, assessing and collecting income taxes owing by the brothers; that it was part of the conspiracy that the brothers would file false and fraudulent federal income tax returns for certain years; and that it was also a part of the conspiracy that they would refrain from filing such returns for certain years, all in violation of 18 U.S.C., Section 371. (App. 5.)[1/] Counts II, III and IV charged Anthony Garguilo (hereinafter referred to as Tony) with making and subscribing false income tax returns for the years 1969, 1970 and 1971, in which he failed to report income and expenses from a gambling business operated by him and from which he had substantial unreported income during those years, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.). (App. 6-8.) Counts V, VI and VII charged Andrew Garguilo (hereinafter referred to as defendant) with willfully failing

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1/ "App." refers to the defendant's-appellant's appendix. "Tr." refers to the trial transcript.

to file income tax returns for the years 1969, 1970 and 1972, in violation of Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.), although he had received income required to be reported from the operation of a gambling business. (App. 8-10.) Count VIII charged defendant with making and subscribing a false income tax return for the year 1971 in which he failed to report income and expenses from a gambling business operated by him and from which he had substantial unreported income during that year. (App. 10.) After a jury trial, Tony was found not guilty on all of the counts with which he was charged, and defendant was found not guilty on the conspiracy count and on Count VIII. Defendant was, however, found guilty of willfully failing to file income tax returns for the years 1969 and 1972 (Counts V and VII). (App. 73.) He was sentenced to a six-month prison term and fined $2,500 on Count V, and on Count VII was fined $2,500 and also given a six-month term of imprisonment. Execution of the sentence of imprisonment on Count VII was suspended and defendant was placed on probation for three years, to begin upon the completion of the prison sentence imposed on Count V. (App. 73.) Defendant filed a timely notice of appeal on December 10, 1976. (App. 74.) The jurisdiction of this Court is based on 28 U.S.C., Section 1291.

The evidence to support the verdicts of guilty on Counts V and VII may be summarized as follows:

Defendant filed no federal income tax return for the year 1969 (Tr. 59-60) or for the year 1972 (Tr. 65-66). In broad outline, the Government's evidence showed that during those years he had received such substantial income from the operation of a blackjack (21) game, from bookmaking, and from short-term capital gains, that he was required by law to file tax returns. (Tr. 593-610.) The bulk of the Government's case consisted of the testimony of gamblers who had either played blackjack with defendant or placed bets on sporting events with defendant or his brother, Tony.

Arthur Lieberman testified that he (Lieberman) played in a blackjack game in Brooklyn where chips were used; that defendant furnished him with the chips, and he paid defendant for them when he left for the evening; that the house cut for each evening ranged between $500 and $1,500[2/] (Tr. 191-198); that in 1969 he (Lieberman) attended these games, which were usually held on Wednesday nights, practically every week (Tr. 194-195); that the minimum bet that could be played in the blackjack game was $20 or $25 and the maximum bet was $300 (Tr. 193-194); and, that by 1970 Lieberman's participation had "tapered down" (Tr. 195). It was established by other witnesses that this blackjack game was played in the Brooklyn home of Bennie Balsamo, who was defendant's brother-in-law (Tr. 177, 742) and that the home was in the name of defendant's wife (Tr. 751). At times defendant's brother Tony was present at the blackjack games in

2/ The transcript originally showed a range for the house cut of $1,500 to $2,500 per night, but it was later agreed that there had been a typographical error and that the correct figures were $500 to $1,500. (Tr. 586-587.)

Brooklyn. (Tr. 201.) Lieberman testified that defendant participated in every blackjack game Lieberman played in (Tr. 222.)

Joel Schwartz testified that he began participating in a blackjack game in 1970 or 1971 in the home of Bennie Balsamo (Tr. 150); that the chips were worth $25 and $100 each; that he bought the chips either from Balsamo or from the dealers or from defendant (Tr. 150-151); that defendant played blackjack frequently (Tr. 178); that if Balsamo was not present defendant would "handle" the game (Tr. 161); that Schwartz "guessed" that defendant ran the game after Balsamo died in 1972 (Tr. 161-162, 750); that there were usually four to nine players in the game; that defendant was present in 1972 and sometimes Schwartz purchased chips from him (Tr. 156-157); that defendant partcipated in the game (Tr. 158); that in 1972, after Balsamo died, the game was moved from Brooklyn to a location in Manhattan at about East 40th Street and Second Avenue (Tr. 153); and that sometimes the house cut was $1,000 or $1,500 and sometimes there was no house cut (Tr. 156-157).

Schwartz also testified that he first met defendant sometime in the late 1960's (Tr. 144-145); that he used to place bets with defendant on racing and other sporting events; that he maintained an account with defendant which was settled from time to time; and that he placed approximately $100,000 in bets with defendant in the year 1969 and roughly a similar amount in 1972 (Tr. 148-149).

Leon Mayer testified that he first met defendant in 1969 or 1970 at the home of one Balsamo in Brooklyn (Tr. 225-226); that there was a blackjack game there and he used to get chips from either Balsamo or defendant; that they were in denominations of $5, $25 and $100; that the minimum bet was $20 or $25 and the maximum bet was $300 (Tr. 226-227); that there was a house cut of about $5 to $15 taken out of each pot; and that the game lasted about four and one-half hours and there was roughly one pot every ten minutes (Tr. 228-229). Mayer admitted that he had told the grand jury that the house cut probably varied from $700 to $1,000 a night and that that testimony was correct when he gave it. (Tr. 231-232.) He also stated that Tony was occasionally present at the games (Tr. 232.)

David Roth testified that he first met defendant early in 1972 (Tr. 507); that he participated in blackjack games that were held in the Churchill Apartments in Manhattan, playing in about 10 or 12 such games in 1972; that the chips were of $25, $50 and $100 denonminations; that he got his chips from defendant and paid him for them (Tr. 508-509); that defendant did not participate in the games (Tr. 509); that he (Roth) also placed bets on sporting events in 1972, using a telephone number supplied him by defendant (Tr. 510); that when he lost he would usually settle up with defendant; and that his 1972 losses totalled about $5,000 (Tr. 511).

John Haskell testified that he first met defendant's brother, Tony, in March, 1971 (Tr. 358-359; 367); that subsequently he placed bets with a man named Wilson, who was associated with Tony in gambling (Tr. 360-361); that he knew there was a connection because when he placed bets with Wilson he would pay Tony (Tr. 361-362); that normally he would settle up with Tony but sometimes with defendant (Tr. 365); that he lost at least $20,000 on these bets in 1972 (Tr. 370-371); that on several occasions in 1972 he played blackjack in Manhattan, procuring his chips from defendant or from his brother, Tony (Tr. 371-372, 390); and that he would settle up for these chips at the end of the game either with Tony or defendant (Tr. 372). Sometime in 1972 John Haskell found himself indebted to Tony and the defendant in some amount between $15,000 and $20,000, which he paid off in weekly installments during 1972. (Tr. 379-380.)

Herbert Haskell testified that he was chairman of the board of DHJ Industries (textiles) (Tr. 404); that he first met Tony Garguilo in March, 1971 (Tr. 405); that subsequently he placed wagers with "someone associated with Tony" whom Haskell knew as "Mr. Wilson" (Tr. 407); that when he settled up for his losses he would either cash a check or write a check payable to cash and leave it with his secretary and someone from "Mr. Wilson's" office would pick it up (Tr. 419); and that sometimes it would be picked up by a man named Ben and sometimes by defendant (Tr. 420). Herbert Haskell further

testified that in 1972 he owed the Garguilo brothers $120,000, (Tr. 434, 455); that he discussed with Tony Garguilo a method of paying off the debt (Tr. 456); that he told Tony that he had no money and that the only way he could pay the debt off was to give him some nonnegotiable stock which he owned (Tr. 456); that in June, 1972, he gave Tony a stock certificate for 5,000 shares of DHJ Industries stock made out to Tony (Tr. 456-459); that a similar certificate for 5,000 shares was made out, at Tony's request, in favor of defendant (Tr. 462-463); that this stock was "restricted" and could not be sold in the open market (Tr. 464); that the market value of the stock at the time of transfer was $22 per share, but that if the Garguilos sold it they could realize only 25 percent to 35 percent of that amount, since it was supposedly nonnegotiable (Tr. 465). In June or July, 1972, the stock certificates were delivered to Tony Garguilo, a 5,000 share certificate made out to Tony and a similar 5,000 share certificate made out to defendant (Tr. 489-490); there were certain restrictions on the negotiability of the certificates (Tr. 496).

There were introduced into evidence certain stock brokerage records of defendant's 1969 account with Plohn and Company (Tr. 542-546), including six checks totalling $26,000 which had been sent to defendant in June, 1969 (Tr. 552-553).

The Government's expert summary witness, Irving Wax, concluded that defendant had realized $16,219.69 of taxable income in 1969, $6,219.69 of that amount consisting of short-term capital gains on the sale of securities through Plohn

and Company (Tr. 599), and the other $10,000 consisting of defendant's 50 percent share of the house cuts from the blackjack games. The $10,000 figure was based on the testimony of Lieberman, supra, that the house cut ranged from $500 to $1,500 per night (Wax took the lesser of the two figures) plus his testimony that there was a game practically every week in 1969 and that defendant participated in every blackjack game Lieberman played in. (Tr. 194-195, 222.) Wax estimated that if there were 40 games during 1969, and the average house cut was $500 per game, that would give a total of $20,000 of which defendant must have realized half, or $10,000. (Tr. 582-583.)

For the year 1972, Wax estimated defendant's income at $45,965, consisting of $6,965 from the blackjack games (based on the testimony of Schwartz, Lieberman and Mayer and averaging out their minimum estimates of the house cuts) (Tr. 591-592, 603, 609, 622, 625), plus $40,000 from bookmaking operations (comprised mainly of the 5,000 shares of DHJ Industries stock--which was valued at 25 percent of its fair market value of $22 per share, or $27,500, in view of the difficulties which would have been encountered in negotiating it), and minus $1,000, which represented the deductible portion of capital losses (Tr. 604, 609).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

There is plainly no merit in the argument (Br. 21-34) that the proof did not establish that defendant received any income in 1969 and 1972. Here, defendant follows the familiar appellate technique of (1) pointing out that the evidence must be viewed in the light most favorable to the jury's verdict of guilty; and (2) proceeding to view the evidence in the light most favorable to the convicted defendant, relying heavily on testimony which the jury must be deemed to have rejected.

As to 1969, there was testimony by the witness Lieberman that he regularly attended these games, practically every week (they were played on Wednesday nights) and that by 1970 his participation had tapered down somewhat; that defendant participated in every game that Lieberman ever played in; that the house cut for each evening ranged between $500 and $1,500; that defendant furnished him with the chips and he paid defendant for them when he left for the evening. Other evidence showed that the games were played in the home of one Balsamo (who was defendant's brother-in-law) and that title to the home was held by defendant's wife. From Lieberman's testimony alone the jury could have inferred that defendant received at least a substantial portion of the house cut from the games. Cf. Curley v. United States, 160 F. 2d 229, 232-237 (C.A. D.C., 1947), cert. denied, 331 U.S. 837 (1947). The Government's expert

summary witness, Mr. Wax, estimated defendant's share at $10,000 for 1969 (Tr. 194-195, 222), but, of course, there was no need to fix the precise amount. United States v. Johnson, 319 U.S. 503, 517 (1943); Holland v. United States, 348 U.S. 121, 138 (1954). All that the Government had to prove for that year was that defendant realized more than $600 of income. (App. 43.)

It should be borne in mind, moreover, that the Government's proof showed that defendant realized short-term capital gains from his securities transactions with Plohn & Company of $6,219.69 in 1969 (Tr. 599)--see statement, supra. Since these securities were in defendant's name, the jury was amply justified in concluding that they belonged to him, and in rejecting the defense argument (Br. 28-29) that he was a mere nominee for someone else.

In short, there was ample evidence that the defendant had sufficient gross income in 1969 so as to require him to file an income tax return.

With respect to the year 1972 (Count VII), the same general considerations apply. For that year the testimony of Lieberman was fortified by that of Schwartz and Mayer (see statement, supra) and the Government's expert witness estimated defendant's share of the house cut from blackjack games by averaging out their testimony as to their minimum estimates of those cuts. Blackjack, however, played only a minor part in the 1972 case against defendant. For that year the primary item was the

$27,500 worth of stock in DHJ Industries (representing 5,000 shares valued at $5.50 per share--Tr. 604, 609), which was placed in defendant's name and delivered to him by Herbert Haskell in June, 1972, in payment of gambling debts owed to defendant and his brother, Tony. (It will be recalled that in 1972 such a 5,000 share certificate was also delivered to Tony by Haskell). Again, there was no need for the Government to prove the exact amount of defendant's income, but only that he had received at least $2,800 of income during 1972. (App. 43.)

Defendant also argues (Br. 22-24) that there was a failure of proof because the Government proved only gross receipts from the gambling business and not gross income. Proof of gross receipts, however, is sufficient. Evidence of "unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses, if any." Siravo v. United States, 377 F. 2d 469, 473-474 (C.A. 1, 1967); cf. United States v. Stayback, 212 F. 2d 313 (C.A. 3, 1954), cert. denied, 348 U.S. 911 (1955); United States v. Hornstein, 176 F. 2d 217 (C.A. 7, 1949).

There is no substance in the argument (Br. 34-38) that the Government did not prove willfulness. Willfulness, of course, is a state of mind and whether it existed or not is a question for the jury in view of all the facts and circumstances in the record. Here, it was shown (Tr. 72-73) that defendant filed tax returns for 1966, 1967 and 1969, thus establishing his knowledge of his duties under the tax laws. There was a

substantial tax due for 1969 and 1972 (Tr. 607, 609), and that fact, too, was relevant on the issue of willfulness. Lumetta v. United States, 362 F. 2d 644, 645-646 (C.A. 8, 1966), and cases cited. It was for the jury, having listened to the testimony for a number of days, to decide whether defendant's failures to file in both 1969 and 1972 were inadvertent or deliberate, whether they resulted from negligence or ignorance on defendant's part, or from a "voluntary, intentional violation of a known legal duty," United States v. Bishop, 41: U.S. 346, 360 (1973). On this record the jury could readily infer that the failures to file were willful.

## II

### THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENT OF WILLFULNESS

There is no merit in the claim (Br. 36-38) that the jury was not properly instructed on the element of willfulness. The charge was full and fair, and the jury could not have convicted if it had thought defendant might have had a good faith misunderstanding of the law. The court charged as follows (Tr. 1094-1095):

> As to the third element, wilfullness, the specific intent of wilfullness is an essential element of the offense of failure to file an income tax return. The term "wilfully" used in connection with this offense means, voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently.

> Mere negligence, even gross negligence, is not sufficient to constitute wilfulness under the criminal law.
>
> The failure to make a timely return is wilful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires him to file a timely return which discloses to the Government facts material to the determination of his tax liability.
>
> For Andrew's failure to file to be wilful under this provision of the law there is no necessity that the Government prove Andrew had an intention to defraud it or to evade payment of taxes.
>
> On the other hand, Andrew's conduct is not wilful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

We submit that this charge is in full harmony with the Supreme Court's two latest pronouncements on the subject of instructions on willfulness in criminal tax cases: United States v. Bishop, supra; United States v. Pomponio, 45 U.S. Law Week 3277 (Sup. Ct., Oct. 12, 1976).[3/]

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3/ Defendant points (Br. 36-37) to three specific instructions which he claims that the District Court should have given on the issue of willfulness. We note that defendant argues that the failure to give these instructions was "plain error," thus clearly indicating that he did not object at trial to the failure to give these instructions. Moreover, we are unable to find any evidence in the record which supports the theories underlying these instructions, a fact that is confirmed by the defendant's failure to cite any such evidence in his brief. Under these circumstances, the failure to give these instructions hardly amounts to "plain error." See United States v. Pritchard, 458 F. 2d 1036, 1040 (C.A. 7, 1972), cert. denied, 407 U.S. 911 (1972).

III

THE COURT DID NOT ERR IN THE ADMISSION AND EXCLUSION OF EVIDENCE

The defendant contends (Br. 38-49) that the court below erred in admitting evidence of the receipt of the DHJ Industries stock by defendant and the testimony of the summary witness, Irving Wax; and erred in excluding the testimony of one Appleman. These arguments are uniformly without merit.

(1) The DHJ Industries stock. As we have shown in our statement, *supra*, by the spring of 1972 Herbert Haskell was indebted to defendant and his brother in the amount of $120,000 on account of his gambling activities (Tr. 434, 455); it was agreed that the debts would be paid off by the issuance of a 5,000 share stock certificate of DHJ Industries to Tony and a similar 5,000 share certificate to defendant. Haskell testified that such certificates were issued and delivered in June, 1972 (Tr. 456-459); that this stock was "restricted" and could not be sold on the open market; and that it had a market value of $22 per share at the time of its issuance (Tr. 464-465). Haskell further stated, however, that if the Garguilos sold it they could realize 25 percent to 35 percent of the $22 per share. (Tr. 465.) The Government's expert summary witness assigned a fair market value to this stock as of June, 1972, of $5.50 per share, based on the testimony of Haskell, and concluded that defendant received the sum of $27,500 of taxable income at that time on account of this stock. (Tr. 604, 609.)

It will be seen that the testimony of Haskell, who was presumably (as chairman of the board) in a better position than anyone else to assign a fair market value to the stock, furnished a solid basis for the jury's finding that defendant should have filed an income tax return. Heiner v. Gwinner, 114 F. 2d 723 (C.A. 3, 1940); Chaplin v. Commissioner, 136 F. 2d 298 (C.A. 9, 1943). The cases relied upon by defendant are distinguishable. Helvering v. Tex-Penn Co., 300 U.S. 481, 499 (1937), does hold that in the peculiar facts of that case the stock in question had no ascertainable market value at the pertinent time. But reference to the underlying opinion of the court of appeals-- Tex-Penn Oil Co. v. Commissioner, 83 F. 2d 518 (C.A. 3, 1936), makes it clear that the conclusion that the shares had no fair market value was based not so much on the restrictions on its sale as upon the extremely speculative nature of the stock, which was of such a nature that it was worthless or practically so even without regard to the restrictions on sale. See 83 F. 2d, p. 523. The conclusion of the Board of Tax Appeals that the stock was worth $7 a share was shown to be completely without foundation and could only have been arrived at by ignoring the pertinent evidence. (Id.) Similar considerations render the other case relied upon by defendant--Propper v. Commissioner, 89 F. 2d 617 (C.A. 2, 1937) (Br. 39)--equally distinguishable. There, 46,400 shares were issued in a corporate exchange with a restriction which made it impossible to sell them for a five-year period. The Commissioner put a

value of $21 per share on the stock and the Board of Tax Appeals sustained that determination. However, this court found that at the expiration of the five years the stock was selling at $1.50 per share, that the holders of the stock had earlier made unsuccessful efforts to sell it, and that the Commissioner and the Board had no basis for finding the $21 valuation "or any other value sufficiently ascertainable to justify its inclusion in the computation of the tax" (89 F. 2d, p. 618). In the case at bar, however, the jury was clearly entitled to conclude, on the basis of the testimony of Herbert Haskell, that the DHJ Industries stock--even with its restrictions on sale--had an ascertainable and realizable value of $5.50 per share (25% of $22) in June, 1972, when it was issued.[4/]

(2) The testimony of Irving Wax. There is no merit in the (Br. 41-46) that the summary testimony of the Government's expert witness should have been excluded. It has long been settled that testimony of this nature is admissible in a criminal tax case. United States v. Johnson, 319 U.S. 503, 519-520 (1943). Without it a jury might well be confused by the complexities of the case. Nor is there substance in the claim (Br. 41, 45) that Wax should not have been permitted to testify

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4/ Defendant contends that the Government's summary expert witness used a value of $2 per share rather than the $22. (Citing Tr. 602.) It is clear, however, that the $2 is a mere typographical error (see Tr. 465); otherwise Wax's figures would make no sense at all and he could have been discredited on cross-examination.

as to his conclusion regarding the amount of tax liability owed by defendant. The fact that there was a substantial tax liability in each of the two years was plainly relevant on the issue of defendant's willfulness in failing to file returns. Lumetta v. United States, 362 F. 2d 644, 645-646 (C.A. 8, 1966) and cases cited. That evidence was not rendered inadmissible by the mere fact that it tended to show defendant may have been guilty of some other crime, such as income tax evasion. United States v. Fidanzi, 411 F. 2d 1361, 1363 (C.A. 7, 1969), cert. denied, 396 U.S. 929 (1969).

The balance of defendant's criticism of Wax's testimony is directed almost entirely to alleged errors in computations. First, this contention goes to the weight rather than the admissibility of the testimony. If Wax was as badly confused as to his computations as defendant claims, defense counsel should have been able to discredit him thoroughly on cross-examination. Defendant, however, made no such attempt. (See Tr. 610-635.) The reason seems to be that the errors were not Wax's at all, but mere typographical errors in the figures in the transcript. We have already shown one example of this (see footnote 4, supra). Another example appears on pages 198 and 578-579 of the transcript, where Lieberman is shown to have testified that the house cut on the blackjack games ranged between $2,500 and $1,500 a night. Wax picked up this figure in his computations, and only a moment before he took the witness stand was it pointed out to him that the correct

figures (not appearing in the transcript) were $500 to $1,500 a night. Since Wax has used the $1,500 figure, this immediately resulted in reducing the 1969 income attributable to defendant from blackjack cuts from $30,000 to $10,000. The resulting confusion in the testimony is understandable (see Tr. 582, 585-587, 592-593), but is was not the fault of Mr. Wax. Similarly, with respect to the 1969 short-term capital gains realized by defendant, the correct figure is either $6,209.69 (Tr. 594) or $6,219.69 (Tr. 599)--surely it does not matter which--and not the $3,209.04 figure contended for by defendant (Br. 42), which is plainly based upon a typographical error in the cost or selling price of the securities (Tr. 594)[5/]. Defendant further faults Wax (Br. 42) for using only the testimony of Lieberman in estimating the amounts of the house cuts from the blackjack games in 1969, claiming he should also have averaged in the testimony of Schwartz and Mayer. But the latter two did not participate at all in the 1969 games (Tr. 176; Br. 43), and Wax would have erred in considering their estimates with respect to that year. As we have said, all of these criticisms go to the weight of Wax's testimony, not to its admissibility, and the weight, of course, was for the jury.

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5/ In any event, even if the correct figure were $3,209.04, defendant still would have been required to file a tax return for that year.

(3) The exclusion of Appleman's testimony. There is clearly no merit in the claim (Br. 46-49) that defendant should have been permitted to adduce the testimony of the witness Appleman that in Appleman's opinion the DHJ Industries stock did not constitute taxable income to defendant. The trial court correctly ruled this evidence inadmissible because, relating to events in late 1973 and 1974,[6/] it had no relevance to defendant's state of mind at the time the failure to file took place in April, 1973. (Tr. 811-815.)[7/]

IV

THERE WAS NO FATAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF

Defendant urges (Br. 50-55) that there was a fatal variance between the indictment and the proof and that the court improperly amended the indictment. These claims are without substance. The gist of Count V of the indictment was that defendant was required by law on or before April 15, 1970, to make an income tax return to the District Director of Internal Revenue for the year 1969 and that he willfully

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6/ Appleman never met defendant until November, 1973. (Tr. 810.)

7/ Moreover, from the argument in his brief (Br. 47-49), it seems that one of the purposes of the Appleman testimony was to place hearsay statements of the defendant before the jury (see, e.g., "It [the Appleman testimony] would, if believed, establish that because of the refusal of banks to accept the stock as collateral, and the refusal of anyone else to purchase it, appellant could well have believed the stock was worthless or, at least, did not constitute income in 1972"). Such use of the testimony would, of course, not be permissible. Contrary to defendant's suggestion (Br. 47), Rule 803(3) of the Federal Rules of Evidence would not support the admission of this testimony. See 4 Weinstein & Berger, Evidence, par. 803(3)[05], pp. 803-108 - 803-121 (1975).

and knowingly failed to do so, in violation of Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.). (App. 8.) Count VII was couched in similar language and related to the taxable year 1972. (App. 9-10.) It is true that each of the two counts referred to a "gambling business from which he received gross income in excess of" the amounts which made the filing of a tax return mandatory (App. 8, 9), but this was mere surplusage, not necessary to the validity of the counts. An indictment is sufficient if it charges a crime in the language of the statute, United States v. Lepowitch, 318 U.S. 702, 704 (1943); Ekberg v. United States, 167 F. 2d 380, 387 (C.A. 1, 1948), leaving further details of the charge to be furnished in a bill of particulars. Cf. Heasley v. United States, 218 F. 2d 86, 88-89 (C.A. 8, 1955), cert. denied, 350 U.S. 882 (1955); United States v. Rosenblum, 176 F. 2d 321, 324 (C.A. 7, 1949). As for the language relating to the "gambling business," it will be recalled that there was a wealth of evidence to indicate that defendant did participate in such businesses, to wit, blackjack and bookmaking, and that he realized substantial taxable income from each activity. We are inclined to agree with defendant's argument (Br. 54-55) that the jury did not find that a partnership in the gambling business existed between defendant and his brother, Tony, but that does not invalidate the convictions of defendant on

Counts V and VII.[8/] Even if the "gambling business" phrase be deemed to be an essential part of the allegations of those counts, surely there was ample proof that defendant realized substantial income each year from his gambling operations; there is no requirement that he be shown to have been the owner of the business. If defense counsel was taken by surprise he should have said so and requested a continuance so that he could further prepare his defense. United States v. Ragen, 314 U.S. 513, 536 (1942). This he did not do. Cf. United States v. Burdick, 221 F. 2d 932, 934 (C.A. 3, 1955).[9/]

V

THE COURT BELOW DID NOT ERR IN DENYING THE MOTION FOR SEVERANCE

There is no basis for the claim (Br. 55-64) that the joinder of the brothers in the indictment was improper because the conspiracy count was not brought in good faith, or for the contention that there should have been a severance. To

8/ The court instructed the jury (T. 1107) that if they did not find a partnership then Tony could not be found guilty on Counts II or III (1969 and 1970). This instruction may account for the not guilty verdicts against Tony on those counts.

9/ As part of his argument, defendant asserts that evidence as to capital gains in 1960 constituted a variance from the charges in the indictment. In this regard, we note that when the evidence as to capital gains in 1969 was offered, the defendant stated that he had no objection to the evidence. (See Tr. 548, 552.) In fact, at one point, defense counsel stated that the Government had a right to introduce evidence of capital gains. (Tr. 595.) Nor did the defendant object when the Government's expert summary witness testified that he included capital gains in 1969 income. (Tr. 594.) Finally, the defendant did not object to the capital gains income in arguing his motions for judgment of acquittal. (See Tr. 654-739, 923-925.)

begin with, there is a presumption that a prosecution for violation of a criminal law is undertaken in good faith for the purpose of fulfilling a duty to bring violators to justice. United States v. Falk, 479 F. 2d 616, 620 (C.A. 7, 1973). There is nothing here to overturn the presumption. The evidence tended to show that the brothers were engaged in a gambling operation; that each of them was defrauding the Government by not reporting the gambling income he should have reported; that they were in frequent contact with one another; and therefore that it was logical to believe that they must have discussed the problem of what they should do about reporting or not reporting the income from the gambling operations; and that the pattern that they followed must have been the result of discussions between them. This was the belief of the prosecutor (Tr. 684, 733) and his sincerity is not diminished by the fact that the jury did not view the evidence in the light that he did. Many prosecutions brought in good faith result in acquittals, and this one is no exception. If it were otherwise, the Government would be culpable every time a verdict of acquittal was returned. In this case, the fact that there was substantial evidence to support the charge is shown by the action of the trial court in denying the motion for acquittal and submitting the count to the jury.

As for the argument that there was "prejudicial spill-over" to defendant of evidence admitted solely against Tony (Br. 61-64), it virtually answers itself. It makes no sense to say that evidence admitted solely against Tony, and which the jury found inadequate to justify a conviction of Tony on any of the counts, may have been used--contrary to the court's explicit instructions--to convict defendant. As we have shown, the verdict against defendant was virtually compelled. More importantly, the jury must be deemed to have followed the court's repeated admonitions as to whether certain evidence could be considered against defendant.

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. Opper v. United States, 348 U.S. 84, 95, (1954), quoted in Delli Paoli v. United States, 352 U.S. 232, 242 (1957).

See also Lutwak v. United States, 344 U.S. 604, 615-620 (1953); Blumenthal v. United States, 332 U.S. 539, 552-553 (1947).

## VI

### THE CONVICTION SHOULD NOT BE REVERSED FOR ALLEGED INCONSISTENCY IN VERDICTS

There is no substance in the contention (Br. 65-69) that the conviction must be reversed because it is inconsistent with acquittals on other counts. The argument is completely disposed of by the rule of Dunn v. United States, 284 U.S. 390 (1932), that "Consistency in the verdict is not necessary."10/

There is moreover, no real inconsistency in the verdicts on the various counts. Defendant concedes (Br. 66) that there is no inconsistency between his conviction and the acquittals on the conspiracy count (Br. 66). There is plainly no inconsistency between defendant's acquittal with respect to 1970 and 1971 and his conviction for 1969 and 1972. For each of the latter years, there was solid proof of unreported income. As for Tony's acquittal on Counts II (1969) and III (1970) (App. 6-7), that may have resulted entirely from a finding of the jury that there was no gambling partnership between Tony and defendant; the court instructed the jury expressly (Tr. 1107) that if it made such a finding it would have to acquit Tony on those counts. As for Count IV against Tony relating to 1971 (App. 7-8), that acquittal might have resulted solely from the

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10/ Defendant's argument (Br. 67-69) that the rule of the Dunn case should be reexamined is based partly on a statement made in the dissenting opinion in Dunn (Br. 67); the argument seems to be made in order to preserve the point for use in a petition for a writ of certiorari.

fact on his 1972 return Tony reported $180,000 of "Sullivan case income" (meaning illegal gains). The reporting of such a large sum (Br. 62; Tr. 110-111) may have impelled the jury to conclude that he should not be convicted of filing false returns for any of the years.

CONCLUSION

For the reasons stated, the judgment of conviction should be affirmed.

Respectfully submitted,

MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT E. LINDSAY,
RICHARD B. BUHRMAN,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney.

MARCH, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing two copies thereof to each on this 3rd day of March, 1977, in envelopes, with postage prepaid, properly addressed to each of them, respectively, as follows:

James M. LaRossa, Esquire
522 Fifth Avenue
New York, New York 10036

Joel A. Brenner, Esquire
230 New York Avenue
Bayshore, New York 11706

Gilbert E. Andrews /pck
GILBERT E. ANDREWS,
Attorney.

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CASE NO. 76-1596

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Term, 1977

UNITED STATES OF AMERICA,

Plaintiff- Appellee

vs.

ANDREW GARGUILO,

Defendant-Appellant

The Clerk will enter our appearances as Counsel for the Plaintiff-Appellee

Myron C. Baum per

MYRON C. BAUM
Acting Assistant Attorney General

(Name) Robert E. Lindsay per
ROBERT E. LINDSAY,

(Name) Richard B. Buhrman per
RICHARD B. BUHRMAN,

(Name) Attorneys, Tax Division,

Department of Justice,
(Name) Washington, D.C. 20530

(Name)

(Name)